BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, INC. EXELON CORPORTATION, PEPCO HOLDINGS, INC. PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC, AND NEW SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *DEL.* §§ 215 AND 1016 (FILED JUNE 18, 2014)	))))))))	PSC DOCKET NO. 14-193

MOTION OF THE MID-ATLANTIC RENEWABLE ENERGY COALITION, CLEAN AIR COUNCIL AND STATE OF DELAWARE, DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, DIVISION OF ENERGY AND CLIMATE FOR RECONSIDERATION OF HEARING EXAMINER'S ORDER AND DIRECTIVES

The Mid-Atlantic Renewable Energy Coalition ("MAREC"), Clean Air Council ("CAC") and State of Delaware, Department of Natural Resources and Environmental Control, Division of Energy and Climate ("DNREC") jointly ("Joint Intervenors"), by and through undersigned counsel, hereby move Hearing Examiner Lawrence for reconsideration of portions of the scheduling order dated September 29, 2014, and Order 8638, dated October 2, 2014. In support of their Motion, Joint Intervenors provide the following:

Background

1. On September 29, 2014, after requests from various parties, Hearing Examiner Lawrence issued an unnumbered Scheduling Order that reschedules dates for depositions, the filing of direct testimony, settlement discussions, rebuttal testimony, briefing, evidentiary hearings, and the Commission Minute and Final Orders. The Order notes that the Amended Schedule was "[p]ursuant to the agreement of the parties . . . ," even though the undersigned counsel to this

Motion all were apparently excluded from the discussion surrounding the rescheduled dates found in the Scheduling Order.

2. In paragraph 10 of the Order, the Hearing Examiner moved the date for evidentiary hearings to February 18-20, 2015, from the original dates of December 16 to 18, 2014. However, in paragraph 7, it was ordered that the original hearing dates would be reserved "for consideration and possible decision on any proposed settlement agreement on December 16-18, 2014."

3. On September 29, 2014, by email (copy attached) counsel for Intervenor MAREC emailed Hearing Examiner Lawrence and the service list seeking clarification of the December 16-18, 2014 dates for consideration of a settlement to ensure that those dates would not be used to hear a contested settlement. Counsel noted in part that a contested settlement heard at that juncture "would not provide the contesting parties sufficient time to ready their cases under the new schedule," given the other changes to the schedule.

4. The Scheduling Order moved the dates for the filing of direct testimony by Staff, DPA and Intervenors to December 12, 2014, rebuttal testimony of the Applicants to January 12, 2015, and the dates for pre-hearing briefs to February 11, 2014.

5. Hearing Examiner Lawrence responded to the request for clarification by email on September 30, 2014 stating that the Scheduling Order, in fact, did contemplate the consideration of a contested settlement stating that "it is virtually impossible that all parties in the docket will reach settlement due to their conflicting claims any other position would render the December dates meaningless."

6. On October 2, 2014 Hearing Examiner Lawrence issued Order 8638, titled "Agreed Order Regarding Depositions Order No. 8638," PSC Docket No. 14-193 ("Agreed Order").

7. In paragraph 2, Hearing Examiner Lawrence states "[t]hese parties have agreed that the depositions . . . will be limited in duration;" "the parties should attempt to complete these depositions within four (4) hours, approximately;" and "the parties agree that there is a limited amount of time to take the depositions of other witnesses . . . ." *Id*.

8. In paragraph 3, Hearing Examiner Lawrence states, when referring to the limited depositions, the Joint Applicants may share the four hours with Counsel for Staff and the Public Advocate, "which may extend the length of any time limited depositions." *Id*.

9. In paragraph 4, Hearing Examiner Lawrence states, in reference to those depositions of limited duration for which the Joint Applicants do not "seek equal time," the "Joint Applicants' remaining time shall be equally allocated between or agreed upon by Staff's Counsel and the Public Advocate's Counsel." *Id*.

10. In paragraph 8, Hearing Examiner Lawrence states "[e]ach intervenor which is represented by an attorney who is a member of the Delaware Bar shall be allocated fifteen (15) minutes . . . in a deposition, whether of limited duration or not." *Id*.

11. In paragraph 10, Hearing Examiner Lawrence states "[i]ntervenors not represented by an attorney who is a member of the Delaware Bar may attend the depositions, but are not permitted to ask the witnesses any questions." *Id*.

12. Intervenors, MAREC, CAC, and DNREC were not notified that a deposition schedule was going to be considered in advance of the "Agreed Order," nor were they invited to participate in any discussions concerning the scheduling or conduct of the depositions. At no time were any of these intervening parties advised that there was any concern raised by any other party to the proceeding over any aspect of the conduct of the depositions.

Argument

I. The Hearing Examiner Did Not Consult With All Parties Before Issuing the "Agreed Order."

13. Although Order 8638 is captioned, "Agreed Order," it is uncertain which parties have actually agreed to this order. The impression given by this caption is that all parties were, not only consulted prior to the order being issued, but, in fact, did actually "agree" to the terms of the order prior to the Hearing Examiner issuing it. In fact, only a certain set of the parties were invited to discuss this matter prior to the issuance of the order, and only a certain set of the parties actually agreed to the terms of the order. It is not accurate to title this as an "agreed" order.

14. Hearing Examiner Lawrence states that "these parties" have agreed to limit the duration of depositions for three (3) witnesses. As only a certain set of parties were part of these discussions prior to issuance of Order 8638, it is not possible to determine what facts are present that necessitate these three witnesses be deposed for a limited time. Due to the limited number of parties privy to this discussion it is not possible for the "other" parties in this proceeding to determine if it is necessary to limit the duration of deposition for these three witnesses. Without that knowledge, the order by Hearing Examiner Lawrence to limit the duration for these three witnesses appears arbitrary and capricious.

15. Hearing Examiner Lawrence has determined that four (4) hours is a sufficient amount of time for each of the three (3) witnesses to be deposed. It is not clear why four hours is considered the right amount of time. Additionally, Hearing Examiner Lawrence begins the sentence with "[t]he parties," it is unclear whether this means that only "the parties" who were permitted to join in the discussion which precipitated this order (presumably Counsel for Staff, the Public Advocate, and the Joint Applicants) will be limited to four hours per witness, or if

each witness will only be available to all parties for a total of four hours per witness. Again, without knowledge of the facts presented during the discussion leading to this order it is not possible to determine if the decision to limit the duration of these three witnesses to four hours is arbitrary and capricious. This also begs the question as to why there may be critical discussions held between some parties and the Hearing Examiner, to the exclusion of other parties.

16. Hearing Examiner Lawrence states that "the parties agree" to limit the duration of other witnesses affiliated with the Joint Applicants. It is not clear whether the phrase "the parties" is in reference to all of the parties in this matter, or if it refers only to those parties involved in the discussion related to this order. If it is the former, all parties in this matter did not agree to limiting the duration of any witness in this case. In addition, it is unclear what the phrase "a limited amount of time to take the depositions" means.

II. Limiting Questioning at Depositions to Only Members of the Delaware Bar is Contrary to Conducting an Open and Fair Proceeding.

17. Hearing Examiner Lawrence states that the Joint Applicants may "share time" during the deposition of the three witnesses whose depositions are limited in duration. If the duration of deposition for these three witnesses is in fact four hours total for all parties, does this mean that the "other" parties in this matter would essentially be excluded from questioning these three witnesses? As Hearing Examiner Lawrence states, the Joint Applicants' time "may extend the length of any time limited deposition." *Id*.

18. If the Joint Applicants do not "seek equal time," during the three "limited duration" depositions, Hearing Examiner Lawrence states that the "remaining time shall be equally allocated or agreed upon by staff's Counsel and the Public Advocate's Counsel." *Id*. If the duration of depositions for these three witnesses is four hours total, it seems unfair to the "other" parties that they should not be able to be part of the decision as to which party may use the

remaining amount of the four hours. If the four hours are not the total deposition time, but merely the amount of time that Staff, Public Advocate, and the Joint Applicants receive, it would be more equitable for all parties to decide what parties may use the remaining time of the four hours.

19. Hearing Examiner Lawrence has, with Order 8638, severely limited the ability of parties in this matter who are intervenors, and who are not represented by a Delaware lawyer. Fifteen (15) minutes for each intervenor represented by a Delaware attorney is an extremely limited amount of time. The matters involved in this case are very complicated, and fifteen minutes is not a sufficient amount of time.

20. Those who have entered *Pro Hac Vice* or *Pro Se* are essentially excluded from this proceeding during the deposition period. Limiting the participation of non-Delaware attorneys to merely "attend" the depositions may cast a shadow over this proceeding and appear to the public as less than fair. Attorneys who enter cases as *Pro Hac Vice* are granted all of the rights as an in-state lawyer would be granted for that particular matter. All attorneys, in this matter, who have entered as *Pro Hac Vice* signed a certification that, among other things, affirms that the lawyer agrees to be bound by the Delaware Rules of Professional Conduct, and bound by the rules of the specific court.

III. <u>There Was No Basis for the Limitations to the Depositions</u>.

21. Joint Intervenors were never apprised about problems with the scheduling of depositions. Other than revisions to the scheduling date of the depositions, no dispute arose as far as the Joint Applicants are aware that would warrant the Hearing Examiner's intervention to broadly limit and in some cases exclude the participation of attorneys representing parties that were granted intervention in this proceeding. The "Agreed Order" does not provide any basis whatsoever for this decision by the Hearing Examiner, nor does the Order state which party or parties requested

such intervention and whether such request, if any, was duly noticed to other parties in this matter. This excessive action is highly prejudicial to the rights of Joint Intervenors.

IV. Due Process Dictates That a Contested Settlement Should Only Be Considered at a Later Juncture in this Proceeding.

22. While Joint Intervenors do not object to most of the revisions to the original schedule in this matter, Joint Intervenors contend that the Hearing Examiner's clarification that a contested settlement could be heard in this matter on December 16-18 would violate the due process of parties contesting the settlement. A contested settlement would require evidentiary hearings to determine whether the settlement was in the public interest. All parties contesting the settlement should be entitled to additional discovery to determine the basis for such an agreement. They should also have the opportunity to file their own testimony in opposition to the settlement agreement. These parties should have the opportunity to cross-examine witnesses. As the current schedule contemplates, these parties are limited to filing pre-hearing briefs.

23. Under the amended schedule, there simply would be insufficient time to adequately prepare a case in opposition to such a settlement as direct testimony from parties other than the Applicants would be filed until December 12, 2014, just four days before the start of hearings on the contested settlement. Presumably, the settling parties would need to file testimony in support of the settlement and, in fairness, they would need sufficient time to respond to the settlement either by pre-filed testimony of the contesting parties or live testimony at the hearing. In either case, the current schedule would not provide sufficient time for these important procedural safeguards. Also, this schedule would seem to preclude the filing of pre-hearing briefs prior to a contested settlement hearing. Under the current schedule these briefs are due to be filed by February 11, 2015.

Conclusion

24. The Public Service Commission Regulations provide that "Intervention shall be subject to such **reasonable terms and conditions** as the Commission or designated Presiding Officer or Hearing Examiner may prescribe." 26 Del. Admin C. § 1001-2.9.4. (emphasis added). The Joint Intervenors are not unmindful of the need to organize the depositions to make the most of limited time, and they are willing to work with the Hearing Examiner and all parties to arrange depositions as effectively and efficiently as possible. Joint Intervenors understand the need to use the time allotted for depositions as productively as possible given the time constraints, and are willing to work together to coordinate participation in the depositions to the extent that the interests of the Joint Intervenors allow. But the Hearing Examiner's exclusion of the Intervenors from important scheduling matters is unreasonable and unfairly limits their ability to meaningfully participate in this proceeding.

WHEREFORE, for the reasons set forth above, Joint Intervenors respectfully request that the Hearing Examiner grant their Motion for Reconsideration; remedy the Scheduling Order of September 29, 2014 by clarifying that the December 16-18, 2014 dates will not be used for hearings on a contested settlement; and vacate Order No. 8638 and direct all of the parties to engage in joint discussions over the conduct of depositions for the purpose of coming to an agreement on the scheduling and conduct of the depositions.

Respectfully submitted,

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Date: October 9, 2014